In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 260

AMAZON PETROLEUM CORPORATION ET AL.,
petitioners

v.

ARCHIE D. RYAN, S. D. BENNETT, AND PHIL E. BAER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

The respondents do not oppose the granting of the petition.

The questions presented relate to the validity of Section 9 (c) of the Act of June 16, 1933, known as the National Industrial Recovery Act, to the validity and applicability to petitioners of Regulations IV and VII, as amended, promulgated by Harold L. Ickes, Secretary of the Interior, in aid of the enforcement of Section 9 (c), and to the validity of Section 4 of Article III of the Code of Fair Competition for the Petroleum Industry, ap-

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proved by the President under Title I of the National Industrial Recovery Act. The pertinent provisions of the National Industrial Recovery Act are set forth in Appendix A, *infra;* the pertinent provisions of the Code of Fair Competition for the Petroleum Industry are set forth, *infra,* p. 6ff, and the Regulations, as amended, are set forth in Appendix B, *infra.*

The decree of the District Court of the United States for the Eastern District of Texas enjoined the respondents from (1) enforcing or attempting to enforce against petitioners, their agents and employees, Section 4 of Article III of the Code of Fair Competition for the Petroleum Industry, (2) requiring from petitioners, their agents, servants, and employees the reports required under Regulation IV of the Rules and Regulations issued and promulgated by Harold L. Ickes, Secretary of the Interior, under Section 10 (a) of the National Industrial Recovery Act, (3) instituting any actions of a civil or criminal nature against petitioners for violations of "the aforesaid Code provisions and regulations above mentioned", and from (4) going upon the property of petitioners "under and by virtue of any authority conferred or attempted to be conferred upon said defendants by the aforesaid Code provisions and regulations above mentioned." (R. 178–179.)

The court below, reversing the decree of the District Court, held that Section 9 (c) is valid and

Regulations IV and VII are valid and enforceable against petitioners, and held that injunctive relief could not be had against the enforcement of Section 4 of Article III of the Code, because "an adequate remedy against abuse is afforded in the proceedings indicated by the statute [Sections 3 (b), 3 (c) and 3 (f)] for their respective enforcement" (R. 250), although the court was also of the opinion that "the provision of the Code thus enforced [e.g., as provided in Sections 3 (b), 3 (c) and 3 (f)] does not appear to be unconstitutional" (R. 250).

In view of the uncontroverted evidence establishing that petitioners were in danger at the time of the filing of the suit of criminal prosecution for violation of the Code provision (R. 97–98, 244), the opinion of the court below, so far as it is based on the impropriety of injunctive relief, does not appear to be in accord with other decisions. See *Champlin Refining Co.* v. *Corporation Commission of Oklahoma,* 286 U.S. 210, 238; *Philadelphia Co.* v. *Stimson,* 223 U.S. 605, 621–622.

AMENDED REGULATIONS RECENTLY PROMULGATED BY THE SECRETARY OF THE INTERIOR DO NOT APPEAR TO RENDER THE CAUSE MOOT

Since the decision below was handed down, the regulations adopted in aid of Section 9 (c) have been amended. The Government wishes to call the attention of the Court to these changes and their possible bearing upon the propriety of the request for certiorari.

The Secretary of the Interior by an order dated July 20, 1934 (as amended by his order of July 24, 1934), amended the prior regulations promulgated by him to carry out the provisions of Section 9 (c) by substituting therefor new regulations insofar as future transactions are concerned. The new regulations are set forth in Appendix C, *infra*.

The new regulations embody substantially all the requirements of the two earlier regulations (IV, VII) under attack in this cause. The earlier regulations required monthly reports by producers of petroleum (Reg. IV) containing certain data. The new regulations require such producers to keep and preserve the same data (Reg. V, A) and to report to the Secretary of the Interior from time to time, as called for by him (Reg. VI). The only obligation imposed by the earlier regulations and not by the present ones is that the reports of producers shall contain a declaration that none of the petroleum which they have produced and shipped was produced or withdrawn from storage in excess of the amount permitted by any State law or valid regulation or order prescribed thereunder. The provisions of the earlier regulations (Reg. VII) that all persons subject to Section 9 (c) and to regulations issued thereunder shall keep and maintain, available for inspection by the Department of the Interior, adequate books and records of all transactions involving the production and transportation of petroleum, are continued in force by the new regulations (Regs. IV and V).

A suit attacking the validity of an order by a Federal regulatory body does not become moot because of expiration of the order, where the order is a matter of public interest and is likely to be repeated or renewed. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, 514–516; *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U.S. 433, 452. See also *McGrain* v. *Daugherty,* 273 U.S. 135, 181–182. *A fortiori* the case is not moot where, as here, the order under attack is merely modified and substantially all of its pertinent provisions are continued in effect by the amending order.

Furthermore, the suit was brought to enjoin prosecution of past as well as future violations of certain regulations of the Secretary of the Interior (R. 22). Petitioners' liability for prior violations of the original regulations is still at issue in this case, since the new regulations promulgated by the Secretary on July 20, 1934, are substituted for the earlier ones only "insofar as future transactions thereby or hereby regulated are concerned." In *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U.S. 433, *supra,* which held that a suit to enjoin an order of the Interstate Commerce Commission fixing reasonable transportation rates did not become moot upon expiration of the order, the Court referred (p. 452) to "the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined."

Moreover, the validity of Section 9(c) and of Section 4 of Article III of the Code of Fair Competition for the Petroleum Industry is an issue in the case not affected by the change in the regulations.

The Code of Fair Competition for the Petroleum Industry, as approved by the President on August 19, 1933, provided in sections 3 and 4 of Article III as follows:

> SEC. 3. Required production of crude oil to balance consumer demand for petroleum products shall be estimated at intervals by a Federal Agency designated by the President. In estimating such required production, due account shall be taken of probable withdrawals from storage and of anticipated imports. The required production shall be equitably allocated among the several States by the Federal Agency. The estimates of required production and the allocations among the States shall be submitted to the President for approval, and, when approved by him, shall be deemed to be the net reasonable market demand, and may be so certified by the Federal Agency. The allocations when approved by the President shall be recommended as the operating schedules for the producing States and for the industry. In any States where oil is produced on account of back allowables, total current allowables shall be reduced accordingly.

SEC. 4. The subdivision into pool and/or lease and/or well quotas of the production allocated to each State is to be made within the State. Should such quotas allocated in conformity with the provisions of this section not be made within the State or if the production of petroleum within any State exceeds the quota allocated to said State, the President may regulate the shipment of petroleum or petroleum products in or affecting interstate commerce out of said State to the extent necessary to effectuate the purposes of the National Industrial Recovery Act and/or he may compile such quotas and recommend them to the State Regulatory Body in such State in which event it is hereby agreed that such quotas shall become operating schedules for that State.

If any subdivision into quotas of production allocated to any State shall be made within a State any production by any person, as person is defined in Article I, Section 3 of this code in excess of any such quota assigned to him, shall be deemed an unfair trade practice and in violation of this code.

On September 13, 1933, modifications of the foregoing and various other provisions of the code were made by Executive Order. The Executive Order referred to, so far as it pertains to the above-quoted provisions, reads:

ARTICLE III, Section 3, is amended to read as follows:

Section 3. Required production of crude oil to balance consumer demand for petroleum products shall be estimated at intervals by a Federal Agency designated by the President. In estimating such required production, due account shall be taken of probable withdrawals from storage and of anticipated imports. The required production shall be equitably allocated among the several States by the Federal Agency. The estimates of required production and the allocations among the States shall be submitted to the President for approval, and, when approved by him, shall be deemed to be the net reasonable market demand, and may be so certified by the Federal Agency. The allocations when approved by the President shall be recommended as the operating schedule for the producing States and for the industry [and thereupon Section 4 of this Article shall apply]. In any States where oil is produced on account of back allowables, total current allowables shall be reduced accordingly.

(The brackets indicate new matter.)

ARTICLE III, Section 4, is amended to read as follows:

Section 4. The subdivision into pool and/or lease and/or well quotas of the production allocated to each State is to be made within the State. Should quotas allocated in conformity with the provisions of this Section [and/or Section 3 of Article III

> of this Code] not be made within the State or if the production of petroleum within any State exceeds the quota allocated to said State, the President may regulate the shipment of petroleum or petroleum products in or affecting interstate commerce out of said State to the extent necessary to effectuate the purposes of the National Industrial Recovery Act and/or he may compile such quotas and recommend them to the State Regulatory Body in such State, in which event it is hereby agreed that such quotas shall become operating schedules for that State. (The brackets indicate new matter.)

Thus the Executive Order, in addition to adding the language bracketed, omitted the second paragraph of Section 4 of Article III of the code as originally approved, reading as follows:

> If any subdivision into quotas of production allocated to any State shall be made within a State any production by any person, as person is defined in Article I, Section 3 of this code in excess of any such quota assigned to him, shall be deemed an unfair trade practice and in violation of this code.

We are informed that the omission was inadvertent and it now appears that the trial court (R. 204–233)[1], the court below (R. 243), the peti-

[1] While the trial court's opinion does not specifically quote the language in question, the tenor of the opinion and the ruling of the court are clearly upon the assumption that the second paragraph in question had been continued in effect.

tioners and their counsel (Pet. pp. 25–26), counsel for the government below, and the industry generally [2], have assumed throughout that the second paragraph of Section 4 of Article III had been continued in effect.

We are informed that a supplemental Executive Order will be applied for under the National Industrial Recovery Act so modifying that portion of the Executive Order of September 13, 1933, which relates to Section 4 of Article III of the Code, as to cause the same to contain the language omitted as above set forth. If such Executive Order is issued, certified copy thereof will be filed with the Clerk of the Court.

If certiorari is granted herein, argument of the case upon the merits for the respondents will include discussion of the effect of the foregoing.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
HAROLD M. STEPHENS,
Assistant Attorney General.
CARL MCFARLAND,
M. S. HUBERMAN,
Special Assistants to the Attorney General.

SEPTEMBER 1934.

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[2] See Oil Code Data Book, published by National Petroleum News, Issue No. 3, p. 21; print, distributed by Planning and Coordination Committee, of the Code of Fair Competition for the Petroleum Industry as signed by the President August 19, 1933, and modified by the President September 13, 1933, p. 8.

APPENDIX A

The National Industrial Recovery Act, approved June 16, 1933, c. 90, 48 Stat. 195 (U.S.C. Sup. VII, Title 15, Secs. 701, 702 (b), 702 (c), 703 (a), 703 (b), 703 (c), 703 (f), 709 (c), 710 (a)) provides in part:

> SECTION 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.

SEC. 2. (b) The President may delegate any of his functions and powers under this title to such officers, agents, and employees as he may designate or appoint, and may establish an industrial planning and research agency to aid in carrying out his functions under this title.

(c) This title shall cease to be in effect and any agencies established hereunder shall cease to exist at the expiration of two years after the date of enactment of this Act, or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 has ended.

SEC. 3. (a) Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: *Provided,* That such code or codes shall not permit monopolies or monopolistic practices: *Provided further,* That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a con-

dition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared.

(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended.

(c) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition approved under this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

(f) When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more

than $500 for each offense, and each day such violation continues shall be deemed a separate offense.

SEC. 9. (c) The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both.

SEC. 10. (a) The President is authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of this title, and fees for licenses and for filing codes of fair competition and agreements, and any violation of any such rule or regulation shall be punishable by fine of not to exceed $500, or imprisonment for not to exceed six months, or both.

APPENDIX B

The two regulations by the Secretary of the Interior involved in the present litigation read as follows:

IV

Every producer of petroleum shall file a statement under oath, sworn to before any duly authorized State or Federal officer, not later than the fifteenth day of each and every calendar month, beginning with August 15, 1933, with the Division of Investigations of the Department of the Interior, unless otherwise ordered to report at more frequent intervals by the Division, which statement shall contain the following information for the given field involved covering the preceding calendar month:

(1) The residence and post-office address of the producer.

(2) The location of his producing properties and wells, the allowable production for each property and well as prescribed by the proper State agency for both property and wells.

(3) The daily production in barrels produced from each property and well.

(4) A report of all deliveries of petroleum showing the names and places of business of all persons to whom such petroleum was delivered whether purchasers, consignees or transporting agencies, and the quantity involved in each delivery, transportation or other disposition thereof, together

with a report of all petroleum in storage, wherever located, at the beginning and at the end of said calendar month, the place of storage and the amount in storage at each place.

(5) A declaration that no part of the petroleum or the products thereof produced and shipped has been produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder by any Board, Commission, Officer, or other duly authorized agency of the State in which the petroleum was produced. [As amended by Order of July 25, 1933.]

VII

All persons, natural or artificial, embraced within the terms of Section 9 (c) of the National Industrial Recovery Act (Public No. 67, 73d Congress) and the Executive orders and regulations issued thereunder, shall keep and maintain available for inspection by the Division of Investigations of the Department of the Interior adequate books and records of all transactions involving the production and transportation of petroleum and the products thereof.

APPENDIX C

The regulations promulgated by the Secretary of the Interior on July 20, 1934, as amended by him on July 24, 1934, provide in part as follows:

> By virtue of and pursuant to the authority vested in me by Sections 9 (c) and 10 (a) of Title I of the Act of Congress entitled "The National Industrial Recovery Act" approved June 16, 1933 (48 Stat. 195) and the executive orders of the President of the United States No. 6199 (July 11, 1933) and No. 6204 (July 14, 1933) issued pursuant to such legislation, the regulations and amendments thereto promulgated by me on July 15, 1933, July 25, 1933, August 2, 1933, August 21, 1933, April 6, 1934, and May 21, 1934, pursuant to said authority are hereby amended by substituting therefor the following regulations insofar as future transactions thereby or hereby regulated are concerned:
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> IV
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> All persons engaged in producing, refining, reclaiming, shipping, storing, transporting, buying or selling, or otherwise dealing in or handling petroleum or the products thereof shall permit any officer, agent, or employee of the Division of Investigations of the Department of the Interior to enter upon their properties, plants, or facilities and to examine all of the books and records kept or required to be kept in accordance with these Regulations and all

other books, papers, records, vouchers, run tickets, bills of lading, way-bills, charts, memoranda or other documents which are used by them in the process of producing, storing, refining, reclaiming, transporting, handling or otherwise dealing with petroleum or the products thereof, and to inspect such plants, facilities and properties and to gauge tanks and to examine wells, pipe lines, gathering systems, flow lines, pipe connections, storage tanks, loading racks, separators, pumps, meters or other measuring devices and any other equipment or instruments.

Every initial producer of petroleum, and every initial manufacturer of every product of petroleum, shall accurately gauge and measure all petroleum and all products thereof before any part thereof leaves his possession or control. No means or device which prevents such accurate measurement shall be used. Complete and accurate records of all such measurements shall be kept up to date and preserved, and shall be open to the inspection of any duly authorized agent of the Division of Investigations of the Department of the Interior at all reasonable times.

V

From the date of approval of these Regulations the following records shall be kept and preserved accurately and completely, showing the complete details of each transaction as follows:

A. By Producers:

(1) The location of the producing properties, the number and location of wells thereon, and the allowable production for each

property and well as prescribed by the proper State agency.

* * * * *

(3) An opening and closing inventory of the crude petroleum on hand each 24-hour day.

(4) The daily production in barrels of petroleum produced from each lease and well (estimated as to wells which are produced into common tankage and of which no separate gauge is made) with a notation of the allowance made for basic sediment and water, and the tanks, identified by number, into which the petroleum was produced.

(5) The amount of crude petroleum consumed, refined or processed upon the property daily.

(6) A daily record of all deliveries of crude petroleum or products thereof, showing the names and places of business of all persons to whom such petroleum or products thereof was delivered, whether purchasers, consignees or transporting agencies, the quantity involved in each delivery, transportation or other disposition, the identity of the means of transportation by which the petroleum or products thereof was removed, and the identifying numbers of tenders where tenders may be required by State regulatory bodies or by orders issued under these Regulations.

* * * * *

VI

From time to time or periodically as called for by the Secretary of the Interior sworn reports on forms approved by the Secretary of the Interior shall be filed by producers, purchasers, refiners, reclamation plants, transporting agencies, shippers, or other persons dealing in or handling petroleum or its products. Each such report when called for shall show the full and accurate data required completely to fill out such form, accurately and fully reporting the data called for from the records required to be kept under Regulation V above.

U. S. GOVERNMENT PRINTING OFFICE: 1934